

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHAEL G. STANLEY**  
Claimant

VS.

**GREAT AMERICAN HARDWOOD  
FLOORS, INC.**  
Respondent

AND

**FIRST COMP INSURANCE COMPANY**  
Insurance Carrier

Docket No. 1,040,209

**ORDER**

Claimant requests review of the August 12, 2008 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant did not meet his burden to show that he had sustained an injury that arose out of and in the course of his employment and therefore denied the claimant benefits.

The claimant requests review of this decision. Simply put, claimant contends that the evidence, taken as a whole, satisfies his burden of showing he sustained an injury which occurred as a result of his employment activities. Thus, the ALJ's Orders should be reversed and he should be granted the benefits he seeks.

Respondent argues that the ALJ should be affirmed in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a working supervisor who installed various types of floors in both home and commercial settings. There is no dispute that he had suffered a low back injury at some point during September 2007 which led to surgery in March 2008. The dispositive issue in this case is whether his work activities caused that injury and his subsequent need for surgery.

Both parties provided a significant amount of testimony. Distilled to its essence, claimant alleges he injured his back while working although he concedes that at various times he has attributed his injury to either unknown sources or to sources unrelated to work. On September 26, 2007, claimant appeared for work complaining of a sore back. He admits he did not, at that point, know what caused his back to hurt. He told the office manager, Corina Wedel, of his pain, and she suggested a chiropractor. Claimant did, in fact, see a chiropractor but felt that his treatment wasn't helping. So he went on to see Dr. Thode, an orthopaedist, at the Hutchinson Clinic. Claimant did not report any work-related injury during this visit. On October 17, 2007, claimant had a MRI which did not show a disc herniation. Dr. Thode gave claimant restrictions which limited him mostly to supervisory duties during installations. These limitations were honored and claimant continued to work.

On October 22, 2007, claimant contacted the Hutchinson Clinic and advised a nurse that he had suffered a sudden pain in his back while picking up a nailer. According to claimant, he was supervising his crew and they were allowing a nailer to scratch a floor during installation. He bent down to pick the nailer up and experienced immediate pain. Claimant says he was unable to stand back up and had to crawl on the floor. None of the employees claimant was working with corroborated this story. In fact, claimant was apparently back at work the next day and in the months after. Claimant did have another MRI on November 6, 2007 and that MRI showed a disk herniation at L4-5 that wasn't present in the earlier MRI.

And while there were some conversations between claimant and Ms. Wedel about his back complaints, Ms. Wedel testified that until this claim was filed there was no contention that his condition was work-related. In fact, according to her, claimant has attributed his back complaints to an incident at home stepping or slipping off steps<sup>1</sup>, to the chiropractor's malpractice<sup>2</sup>, or to the installation of some staircase<sup>3</sup>. Claimant admits that while he filled out forms for short-term disability and lied about the source of his back problems, it was nonetheless his work activities that caused his present complaints and the need for treatment.

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<sup>1</sup> P.H. Trans., Resp. Ex. 1 at 1, 3.

<sup>2</sup> *Id.* at 87.

<sup>3</sup> E-1 Application for Hearing (filed May 14, 2008).

Admittedly, there is a nurse's note that corresponds to claimant's contention that on October 22, 2007 he suffered an acute onset of pain. And there is an MRI report that documents a herniation on November 6, 2007. But according to claimant, he suffered such an overwhelming sense of pain on October 22, 2007, that he fell to the floor and then crawled away before he could stand up. He maintains that this event was witnessed but those witnesses deny it. And it is difficult to see how claimant could have experienced such a painful episode and then not relay that immediately to Ms. Wedel. She denies that he contacted her on that day and told her of any such event.

In the past the Board has held that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and at least one of respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed respondent's recitation of the events over that offered by claimant. This member of the Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>4</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated August 12, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant  
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>4</sup> K.S.A. 44-534a.